BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions Below.

The opinion of the District Court is published in 56 U. S. P. Q. 213, the opinion of the Circuit Court of Appeals is at page 428 of the record. It is reported in 139 Fed. (2d) 98.

Jurisdiction.

The petition sets forth, on page 2, the grounds on which jurisdiction is invoked.

Statement of the Case.

The petition sets forth an outline of the facts on pages 3 and 4, under the caption—"Summary and Short Statement of the Matters Involved". The facts are fully and accurately reported in the District Court's findings of fact and conclusions of law, which were not disturbed by the Circuit Court of Appeals. These findings and conclusions can be accepted as a complete statement of the facts. They are at pages 405-408 of the record and are as follows:

FINDINGS OF FACT.

1. Plaintiff, Taylor Instrument Companies, is a New York corporation with its principal office in Rochester, New York.

2. Defendant, Fawley-Brost Company, is an Illinois corporation with its principal office in Chicago, Illinois.

3. This is an action between citizens of different states wherein the amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00). The action also arises under the Trade Mark Laws of the United States (Title 15

U. S. C. A., Secs. 81-108) and the Copyright Laws of the United States (Title 17 U. S. C. A., Secs. 1-43).

4. Plaintiff is engaged in the manufacture and sale of scientific instruments for indicating, recording and controlling temperature, pressure, flow, liquid level and humidity, weather barometers, and other kindred types of instruments. Plaintiff and its predecessors have been engaged in such business since about the year 1851.

5. Plaintiff is also engaged in the manufacture and sale of charts used in connection with temperature and pressure recording instruments.

6. Plaintiff has a world-wide business in the sale of its products and the annual sales are in excess of Five Million Dollars ($5,000,000.00).

7. The annual volume of plaintiff's sales of charts for recording instruments is in excess of ten million (10,000,000) charts.

8. Plaintiff's sales of said charts in the Chicago trade territory for the years 1941 and 1942 were approximately one and one-half million (1,500,000) charts annually.

9. Plaintiff's products are extensively advertised.

10. Plaintiff applies the name "Taylor" to its instruments and charts as the trade mark therefor, and the name "Taylor" is the means by which the trade and public identify the plaintiff's products and distinguish them from similar products of others.

11. The name "Taylor" in connection with recording thermometers and such instruments, and in connection with charts for use in connection with recording instruments, has acquired a secondary meaning in that it is recognized by the trade and public as indicating the plaintiff and plaintiff's products only.

12. Plaintiff registered its trade mark "Taylor" in the United States Patent Office for measuring and scientific appliances on April 26, 1921, No. 141,813.

Plaintiff registered its trade mark "Taylor" in the United States Patent Office for charts on May 29, 1934, No. 313,523.

Plaintiff registered its trade mark "Taylor" in the United States Patent Office for altimeters and a large number of other measuring and scientific appliances on July 10, 1934, No. 314,945.

These registrations are valid and subsisting and the plaintiff is the owner of the trade mark "Taylor" and the aforesaid registrations.

13. Plaintiff's charts, which are the subject matter of this action, Exs. B and B-3 to B-19, inclusive, were duly copyrighted by the plaintiff as drawings of a scientific or technical character by publication in the United States with the proper statutory notices of copyright on each copy. Copies of said charts were promptly deposited with the Register of Copyrights with the statutory fees, together with applications for copyright registrations, whereupon the Register of Copyrights issued to the plaintiff copyright certificates for said charts, Exs. B-1 and B-3a to B-19a, under Sec. 5(i) of the Copyright Act of 1909.

14. Plaintiff, in order further to identify the origin of its charts, applies to said charts arbitrary code numbers.

15. Defendant, Fawley-Brost Company, is engaged in the manufacture and sale of charts for use in connection with recording and measuring instruments such as are manufactured by the plaintiff.

16. Defendant uses, without permission from the plaintiff, in connection with the advertising and sale of its charts, plaintiff's trade mark "Taylor" and the abbreviations thereof, "Tay" and "T", and defendant displays upon some of its charts the letter "T".

17. Defendant, without permission from the plaintiff, displays upon its charts, Exs. C-2 to C-19, inclusive, and its price lists, plaintiff's arbitrary code numbers, which defendant generally prefixes by the numerals "10" or "12".

18. Plaintiff's agents placed written orders for "Taylor charts" with the defendant; said orders were filled with defendant's merchandise.

19. Defendant's charts, Exs. C-2 to C-19, inclusive, are copies of plaintiff's charts, Exs. B and B-3 to B-19, inclusive, respectively, and were copied therefrom without plaintiff's permission.

20. Defendant, prior to the filing of this action, copyrighted some of its charts, namely, Exs. C-2 and L-1, by publishing them with the statutory copyright notice, and defendant displays a copyright notice on the boxes on which it sells most of its charts.

21. The use of the name "Taylor" and the abbreviations thereof, "Tay" and "T", by the defendant indicates an intention on the part of the defendant to gain something from plaintiff's reputation and its advertising, so that it could compete unfairly with the plaintiff and to give defendant's products a salability they would not otherwise have.

22. The copying by defendant of plaintiff's charts saves the defendant labor and expense of computing and designing the charts which it manufactures and sells.

Conclusions of Law.

1. The trade mark "Taylor" is valid and is owned by the plaintiff.

2. The letters "Tay" and "T" are abbreviations of the trade mark "Taylor" and are a colorable imitation of plaintiff's registered trade mark "Taylor".

3. Plaintiff's registrations of the trade mark "Taylor" in the United States Patent Office are valid and subsisting.

4. The use by the defendant of the name "Taylor" and the abbreviations thereof "Tay" and "T", by the defendant constitutes a colorable imitation of and an infringement of plaintiff's registered trade mark "Taylor".

5. Passing off by defendant of its charts upon orders for Taylor charts constitutes unfair competition with the plaintiff.

6. Plaintiff's charts are proper copyrightable subject matter.

7. Plaintiff's copyrights of its charts, Exs. B and B-3 to B-19, inclusive, are valid and subsisting, and the plaintiff is the owner of said copyrights.

8. The copying by the defendant of plaintiff's copyrighted charts constitutes copyright infringement under the Copyright Act.

9. The use by the defendant of plaintiff's arbitrary code numbers for its charts constitutes unfair competition with the plaintiff.

10. The defendant's counterclaim is without merit and should be dismissed.

11. Plaintiff is entitled to an accounting under the Federal Trade Mark and Copyright Statutes for the damages sustained by the plaintiff and the profits made by the defendant in the use of plaintiff's registered trade mark and the copying of plaintiff's copyrighted charts.

12. Plaintiff is entitled to its costs.

The judgment of the District Court enjoining the defendant from its acts of trade mark infringement, unfair competition and copyright infringement is at pages 409-410 of the record.

SPECIFICATION OF ERRORS.

1. That the Circuit Court of Appeals for the Seventh Judicial Circuit denied the petitioner the protection which the Copyright Act confers.

2. That the Court of Appeals denied the petitioner the protection which the federal Trade Mark Statutes confer.

3. That the Court of Appeals ignored Sec. 5(i) of the Copyright Act under which petitioner's charts are copyrighted.

4. That the Court of Appeals erroneously reversed the District Court, relying upon copyright cases decided before the Copyright Act of 1909.

5. That the decision holding that since petitioner's charts are things of use, they are not entitled to copyright protection is in conflict with the rule announced by this Court in *Bleistein* v. *Donaldson Lithographing Company*, 188 U. S. 239.

6. That the decision denying petitioner the protection afforded by the federal Trade Mark Statutes is in conflict with *Thaddeus Davids Co.* v. *Davids*, 233 U. S. 461, and *Armstrong Paint and Varnish Works* v. *Nu-Enamel Corporation*, 305 U. S. 315.

7. That the decision is in conflict with the proper application of Rule 52(a) of the Rules of Civil Procedure, which provides that:

> "Findings of fact shall not be set aside unless clearly erroneous * * *."

ARGUMENT.

The copyright question presented has never been passed upon by this Court, or, so far as we know, by any Circuit Court of Appeals except in this case by the Circuit Court of Appeals of the Seventh Circuit. Briefly, it is whether copyrightable subject matter, duly copyrighted under an express provision of the statute, ceases to be such when used in a machine.

There is no doubt that the result of the work involved in the preparation of petitioner's charts is copyrightable. Similar computations, such as tables of logarithms, mathematical tables, and the like have always been protected. (*Bleistein* v. *Donaldson Lithographing Company,* 188 U. S. 239, 250.)

The Circuit Court of Appeals did not hold the District Court's findings to be "clearly erroneous" and did not set them aside, so it must be accepted as a fact that petitioner's charts are copyrightable and that the provisions of the copyright statute—publication with the notice, and deposit of copies were complied with. The Court held, however, that since the copyrighted charts were used as the basis of a record in a recording instrument, they became a part of that instrument and hence incapable of copyright.

This question has never been decided by this Court and it is important that it should be. For many years producers of recording instruments and charts used in them have been copyrighting these charts as "Drawings of a Scientific and Technical Character" under Sec. 5(i) of the Copyright Act (Rec. 348-375). Respondent itself has placed the notice "Copyright by Fawley-Brost Company" on charts it sells, including those copied from petitioner's

(Rec. 189, 190, 395, 396). For thirty years the Copyright Office has been accepting charts like these for copyright, taking the statutory fees and issuing copyright certificates on them (Rec. 348-375). There are thousands of copyrights on such charts which the industry as a whole, petitioner and its competitors have been taking out and the Copyright Office has accepted as representing copyright subject matter.* These copyrights have been respected by the rival makers of recording instruments. In holding these charts not susceptible of copyright, the Circuit Court of Appeals has upset the universal custom of the trade and the administrative interpretation of the Copyright Act.

So far as we know, there has never been a decision of this Court—or indeed of any court—involving this section of the Act. With the increase in the use of measuring instruments and charts to record their readings, the question has become increasingly important. Wherever temperature and flow controls are required, these instruments are used with charts, without which no record could be made. Unless the chart itself and the calculations embodied in it are completely accurate, the record would be useless. These charts are universally used in the dairy industry, in such industries as the manufacture of rubber and oil, and in chemical laboratories.

The preparation of the charts requires engineering and technical skill of a high order. Each separate line and curve involves a complex mathematical calculation (Rec. 110-115). The respondent, instead of making its own calculations, making its own tables and plotting its own curves, slavishly copied the charts compiled and copyrighted by petitioner (Rec. 123, 124, 399). In doing this, as the District Court held, respondent saved itself the labor and expense of making its own calculations (Rec. 408).

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* Public records of the Copyright Office confirm this statement.

Respondent's copying of petitioner's charts was found as a fact, indeed it was admitted, but the Circuit Court of Appeals held that because these charts were used in recording instruments, respondent's appropriation of petitioner's work was legitimate.

There is no question of patent infringement in the case, but we submit that the Court below confused patents and copyrights and did not appreciate the difference between authorship, which is what the Copyright Act embraces, and invention, the field covered by the patent statutes. Authorship is intellectual effort on subject matter resulting in a writing of some sort. Authorship does not require imagination or fancy. The compilers of what Charles Lamb once called "things in book's clothing", road books, directories, time tables, mathematical tables, catalogues, and annotations, are authors from the standpoint of copyright law. Any writing that involves industry, selection, care, discrimination, and the avoidance of error is copyrightable subject matter. Any number of people may work on the same subject matter, and if each is accurate, the results will be identical. Each is an author entitled to copyright the result of his labor and to be protected against the copying of his work by others (*Bleistein* v. *Donaldson Lithographing Company*, 188 U. S. 239, 249.) They, as has been said, "must count the milestones for themselves". In the case of a patent, it is necessary to create something that did not exist before. We need not, in this case, discuss the much disputed question whether invention should be considered objectively or subjectively, because it is well settled that authorship is something very different.

We suggest that the Circuit Court of Appeals did not perceive the difference between the two. But the fundamental error into which, it seems to us, the Court fell was in holding that copyrightable and copyrighted subject mat-

ter ceases to be such when used in a machine, and in accepting respondent's argument below that petitioner's charts are not copyrightable because they are of practical use. This, we submit, conflicts with the rule laid down in *Bleistein* v. *Donaldson Lithographing Company*, 188 U. S. 239, 251.

The Court relied on certain cases, decided before the enactment of the Copyright Act of 1909 and English decisions under a wholly different statute. It was agreed by both sides that the case is one of first impression. It is, we believe, of sufficient general importance for this Court to pass upon it.

Respectfully submitted,

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